IN THE

Supreme Court of the United States

MCA ASSOCIATES, L.P.,

Petitioner,

v.

TOWNSHIP OF MONTVILLE, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, AND THE COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the dismissal of Petitioner's inverse condemnation action, for lack of standing, was a deprivation of Petitioner's Fifth Amendment right to just compensation.

CORPORATE DISCLOSURE STATEMENT

Petitioner, MCA Associates, L.P., is wholly owned by:

Parent: VAP International

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PETITION FOR A WRIT OF CERTIORARI

Montville Associates, L.P. respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of New Jersey.

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED IN THIS CASE

Township of Montville v. MCA Associates, L.P., New Jersey Superior Court, Law Division, No. MRS-L-3718-02 (July 21, 2006). (App. B)

Township of Montville v. MCA Associates, L.P., New Jersey Superior Court, Appellate Division, No. A-4327-06T2 (August 18, 2008). (App. A)

Township of Montville v. MCA Associates, L.P., Supreme Court of New Jersey, No. 63,237 (November 12, 2008). (App. D)

STATEMENT OF THE BASIS FOR JURISDICTION

The Supreme Court of New Jersey issued an Order for final judgment denying Petitioner's petition for certification on November 12, 2008. (App. D) As that decision directly affects Petitioner's Fifth Amendment right to just compensation, this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS INVOLVED IN THIS MATTER

The Fifth Amendment to the United States Constitution provides, in relevant part:

> nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

This appeal involves the deprivation of a property owner's Fifth Amendment right to seek just compensation for property taken by the State of New Jersey.

In 1975, Petitioner's predecessors in title instituted an inverse condemnation action against the New Jersey Department of Environmental Protection ("NJDEP"). On May 7, 1977, this action was resolved by way of a consent judgment ("Consent Judgment") between the property owner and the NJDEP. The terms of the Consent Judgment established certain rights concerning the permissible scope of development on the subject property. The Consent Judgment calls for the subject property to be divided into two separate "zones." Zone 1 could not be developed for any reason, while Zone 2 could be developed subject only to the conditions in the Consent Judgment. The Consent Judgment expressly states that "[n]o restrictions whatsoever shall exist with respect to the development of the acreage situated within Zone 2 so far as the [NJDEP] is concerned," with the exception of several restrictions set forth in the text of the Consent

Judgment. Thus, the owner of the subject property forfeited the ability to develop Zone 1 in exchange for the ability to develop Zone 2 without restriction from subsequently enacted environmental regulations.

The Consent Judgment also preserved the right of the property owner to receive compensation in accordance with the right to develop the property:

> In the event that the plaintiffs' rights with respect to the said property shall be affected by subsequent statutory modification by the legislature of the State of New Jersey, there is hereby reserved to plaintiffs such rights in condemnation or other rights as may be provided by law and this Judgment shall in no way be construed to affect any such rights of plaintiff.

Indeed, the purpose of the Consent Judgment was to secure the property owner's rights to fully develop Zone 2 without restriction because it forfeited any right to develop Zone 1.

Thereafter, Petitioner purchased the property subject to the obligations and privileges provided for in the Consent Judgment. On December 19, 2002, the Township of Montville ("Township") filed an order to show cause why judgment should not be rendered appointing three commissioners to fix the amount of just compensation for Petitioner's property. As required by statute, the Township deposited with the court its estimate for just compensation, $1,286,000.00. The Township based this estimate on its belief that the

subject property was subject to any applicable environmental regulations enacted subsequent to entry of the Consent Judgment. This determination was made after the NJDEP stated in an opinion to the Township that the property was subject to all applicable environmental regulations, including the New Jersey Freshwater Wetland Protection Act, *N.J.S.A.* 13:9B-1 *et seq.*, and the New Jersey Flood Hazard Area Control Act, *N.J.S.A.* 58:16A-50 *et seq.*

Petitioner argued that just compensation should instead be assessed based upon the value of the subject property under the development rights guaranteed by the Consent Judgment. Specifically, in consideration of Petitioner's ability to develop Zone 2 without the imposition of environmental regulations adopted after execution of the Consent Judgment. Under such development controls, the subject property could accommodate a 275,000 square foot office facility in Zone 2.

Faced with the possibility that it may not receive full compensation for the property pursuant to the provisions of the Consent Judgment, Petitioner, with the Court's approval, filed a third-party complaint against the NJDEP claiming inverse condemnation. NJDEP filed a motion to dismiss and then a summary judgment motion, both of which were denied. The Court found that the NJDEP was a "necessary party to [the] action."

Nonetheless, on a motion for reconsideration of the denial of NJDEP's motion for summary judgment, the trial court determined that because the Township took title through eminent domain, the inverse condemnation

claim against the NJDEP was moot because there could not be "two condemning authorities." On August 18, 2008, the New Jersey Superior Court, Appellate Division, affirmed the trial court and held that "MCA lacks standing to assert its inverse condemnation claim because it did not have title to the property when it filed the complaint." The Appellate Division held that

> [t]itle and ownership of the property passed to the township in November 2002, when the township filed the declaration of taking. Since MCA did not contest the township's right to take the property – challenging only the amount of compensation owed – title would not revert to MCA unless the Township abandoned its exercise of eminent domain, which has not occurred. Consequently, MCA lacks standing to pursue an inverse condemnation against the DEP.

[17a-18a (citations omitted).]

Thereafter, on November 12, 2008, Petitioner's petition for certification to the New Jersey Supreme Court was denied.

REASONS FOR GRANTING THE PETITION

Despite the presence of two takings by public entities, Petitioner has been foreclosed from pursuing damages for one of them, namely, the diminution of its property value as a result of the NJDEP's inverse condemnation. The decision to dismiss Petitioner's inverse condemnation complaint for lack of standing is contrary to the well-established principles set forth by this Court. Moreover, this case of first impression in New Jersey is contrary to the decisions of the highest court in Connecticut and other appellate courts throughout the nation. The petition for certiorari should be granted.

THE FINDING THAT PETITIONER LACKS STANDING TO SEEK JUST COMPENSATION FOR INVERSE CONDEMNATION BECAUSE OF A SUBSEQUENTLY FILED EMINENT DOMAIN ACTION IS AN IMPORTANT ISSUE OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Fifth Amendment to the United States Constitution states in pertinent part: "nor shall private property be taken for public use without just compensation." U.S. Const. amend. V. The *Takings Clause* is applicable to the States through the Fourteenth Amendment. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897). The purpose of the *Takings Clause* is to prevent the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should

be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960).

In the seminal case, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 67 L. Ed. 322, 43 S. Ct. 158 (1922), Justice Holmes famously expanded the scope of the Fifth Amendment. Justice Holmes notably stated, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking." It was determined in *Mahon* that even if a state statute substantially furthers the public good, it may still frustrate a property owner's investment-backed expectations sufficient to constitute a compensable "taking."

Some fifty years later, in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), this Court provided a set of complex factors to determine if a regulation has gone "too far," including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. *Id.* "The *Takings Clause*. . . in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation." *Id.* at 627. Such a determination can be made only by an analysis of the "particular circumstances [in that] case." *Id.* at 124 (*quoting United States v. Central Eureka Mining Co.*, 357 U.S. 155, 16878 S. Ct. 1097, 2 L. Ed. 2d 1228 (1958)). This Court recently upheld the government's power to take private property in order

to promote economic development in *Kelo v. City of New London*, 549 U.S. 469, 125 S. Ct. 2655; 162 L. Ed. 2d 439 (2005). Writing for the majority, Justice Stevens noted "the hardship that condemnations may entail, notwithstanding the payment of just compensation." *Id.* at 489.

In this case, the New Jersey courts have taken a view of standing that has directly affected the Fifth Amendment rights of property owners. The rights of citizens to seek "just compensation" have been diminished below the baseline level permitted by this Court. Petitioner was not given the opportunity to present its case under the *Penn Central* factors. Instead, Petitioner's inverse condemnation action against the NJDEP was summarily dismissed for lack of standing without any legal support. The New Jersey Superior Court, Appellate Division, held that "MCA lacks standing to assert its inverse condemnation claim because it did not have title to the property when it filed the complaint." 17a.

However, a property owner has a right seek just compensation for a taking that occurred when he/she owned the property. The date that a complaint alleging inverse condemnation is filed has no effect on the standing of a property owner in such situations. It is "a general rule of the law of eminent domain that any award goes to the owner at the time of the taking, and that the right to compensation is not passed to a subsequent purchaser." *Palazzolo v. Rhode Island*, 533 U.S. 606, 628, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001); *Danforth v. United States*, 308 U.S. 271, 284, 84 L. Ed. 240, 60 S. Ct. 231 (1939); 2 *Sackman*, Eminent Domain,

at § 5.01[5][d][i]. In actions alleging inverse condemnation as a result of a regulatory taking, standing is conferred once a final determination is made by the governing public entity. *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985).

Not only have the Fifth Amendment rights of New Jersey property owners been eroded in violation of the United States Constitution, but the dismissal of Petitioner's inverse condemnation action is also contrary to the decisions of numerous other state courts. Several courts throughout the nation have permitted a property owner to seek damages for a diminution in the value of his/her property as a result of an inverse condemnation, even after title had passed by way of a direct taking. In *Albahary v. City of Bristol*, the Connecticut Supreme Court held that "we do not agree . . . that an inverse condemnation claim relating to a formally taken property cannot be raised in an ongoing condemnation proceeding." 276 Conn. 426, 442 (2005). The Connecticut Supreme Court was asked to determine whether the plaintiff had a right to be compensated for "the totality of the damage caused to their property." *Id.* at 429. The defendant, City of Bristol, entered into a consent order in which it admitted that the operation of its solid waste disposal facility resulted in the discharge of hazardous substances into the groundwater under plaintiff's property. *Id.* at 430. Thereafter, the defendant began condemnation proceedings against the plaintiff. *Id.* at 430.

After title had passed, a dispute regarding the valuation of the property ensued. The defendant argued that damages incurred by plaintiff prior to the taking must be litigated in a separate suit for damages. *Albahary, supra,* at 434-35. The Court determined that "the plaintiffs had a right, in principle, to be compensated in this condemnation proceeding for the pretaking contamination of their property." Ultimately, the Court dismissed plaintiff's inverse condemnation action on other grounds. "[T]he trial court properly concluded that, under the circumstances of this case, the plaintiffs were barred by principles of collateral estoppel from making such a claim" because a determination of appropriate damages was made in a prior judicial proceeding brought by plaintiff. *Id.* at 429.

Similarly, in *Red Mountain, LLC v. Fallbrook Public Utility District*, 143 Cal. App. 4th 333, 355 (App. 2006), the California Court of Appeals rejected the defendant's contention that "once a public entity files a direct condemnation action, an inverse condemnation claim is subsumed into the direct action and may no longer be pursued." In *Red Mountain*, plaintiff property owner brought suit against the defendant for breach of contract, specific performance and inverse condemnation based on defendant's failure to convey to plaintiff a sixty foot access easement as set forth in a written agreement between the parties. *Id.* at 337. While the litigation was pending, defendant filed an eminent domain action condemning the land that was to be encompassed by the easement. *Id.* at 338. The actions were consolidated and presented to a jury. Plaintiff was awarded $1,464,928 for breach of contract and inverse condemnation and $872,569 for the direct taking. *Id.* at 338.

The appellate court upheld the jury's award and found that "there was not a double recovery of damages . . . the two awards compensated Red Mountain for different losses that occurred at different times. The breach of contract/inverse condemnation award compensated Red Mountain for the diminution in value . . . that resulted from Fallbrook's refusal . . . to grant the access easement as promised in the 1978 agreement." *Id.* at 355; *see also Shealy v. Unified Government of Athens-Clarke*, 244 Ga. App. 853 (2000) (holding that inverse condemnation claim was not rendered moot by the counties' subsequent filing of a direct condemnation action, as damage alleged by property owners for diminution in value occurred prior to the direct taking, and thus could be recovered as part of the ongoing eminent domain action; *City of Lake State v. Rogers*, 500 N.E.2d 235, 238-39 (Ind. 1986) (property owner should not be deprived of compensation for partial taking because the city later chose to take the entire property through eminent domain).

Contrary to these decisions, the New Jersey Superior Court, Appellate Division, without any legal support, simply held that

> [t]itle and ownership of the property passed to the township in November 2002, when the township filed the declaration of taking. Since MCA did not contest the township's right to take the property – challenging only the amount of compensation owed – title would not revert to MCA unless the Township abandoned its exercise of eminent domain,

> which has not occurred. Consequently, MCA lacks standing to pursue an inverse condemnation against the DEP.

[17a-18a (citations omitted).]

However, the Appellate Division failed to address the clear fact that Petitioner seeks two awards for damages that occurred at different times. The first award is for the direct taking by the Township through the initial eminent domain action. The second award is for the diminution in value that resulted from the NJDEP and/or Township's inverse condemnation of the property by imposing environmental restrictions on Zone 2 in contravention of the Consent Judgment. In denying Petitioner its fundamental right to seek just compensation for the latter, the Appellate Division disregarded the undisputed fact that the inverse condemnation took place prior to the direct taking when Petitioner was the title holder. While the damages resulting from the NJDEP's inverse condemnation did not appear until after title had passed to the Township through eminent domain, the NJDEP's opinion letter to the Township, which directly affected the value of the subject property, was issued while Petitioner was still the owner.

Accordingly, Petitioner should be afforded the opportunity to seek damages for the diminution in value to the subject property, as alleged in the Third-Party Complaint, in the ongoing eminent domain action filed by the Township. This application seeks to provide Petitioner with the opportunity to present its analysis of the facts under the *Penn Central* formula in

compliance with the above noted constitutional principles set forth by this Court and the holdings of numerous courts throughout the country. "The claims under the *Penn Central* analysis were not examined, and for this purpose the case should be remanded." *Palazzolo*, *supra*, at 632.

CONCLUSION

For the reasons provided above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DECIDED AUGUST 18, 2008

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4327-06T2

TOWNSHIP OF MONTVILLE,

Plaintiff-Respondent,

v.

MCA ASSOCIATES, L.P.,

Defendant/Third-Party,
Plaintiff-Appellant,

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY AND THE COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Third-Party Defendants-
Respondents.

Argued April 9, 2008 — Decided August 18, 2008

Before Judges Parker, R.B. Coleman and Lyons.

Appendix A

PER CURIAM

This is an eminent domain action in which the Township of Montville (Township) condemned property owned by Montville Center Associates (MCA) for the purpose of preserving open space. MCA did not contest the condemnation, but challenged the amount of compensation awarded.

MCA appeals from three orders: (1) an order entered on March 29, 2005, denying MCA's motion in limine; (2) an order entered on July 21, 2006 dismissing MCA's third party complaint against the Department of Environmental Protection (DEP) and its Commissioner; and (3) a consent judgment entered on March 8, 2007 in favor of MCA in the amount of $2,684,500.

In June 1999, the Township began the condemnation process, seeking an appraisal for MCA's property. MCA opposed the Township's inspection of the property for appraisal purposes.

In August 1999, the Township adopted a resolution authorizing condemnation proceedings for the property since MCA had rejected a purchase offer for the appraised amount of $780,000.

In January 2002, the Township filed a verified complaint in condemnation and sought an order to show cause for access to the property to conduct an investigation and tests necessary to identify and

remediate any environmental liabilities associated with the property. In April 2002, the parties entered into a consent order whereby MCA agreed to provide the Township with access to the property. Thereafter, that litigation was dismissed.

In November 2002, the Township filed a verified complaint seeking to condemn MCA's property for open space purposes. The Township also filed a declaration of taking and a notice of lis pendens.

On December 19, 2002, the court entered an order to show cause why judgment should not be rendered appointing three commissioners to fix the just compensation for the property. The court entered an order, pursuant to *N.J.S.A.* 20:3-18, requiring the Township to deposit $1,286,000 into court, which represented the Township's estimate of just compensation for MCA's property. Montville was thereby entitled to immediate and exclusive possession of the property. *N.J.S.A.* 20:3-19.

In February 2003, a judgment was entered in favor of the Township, which then appointed commissioners to fix just compensation. On August 27, 2004, the commissioners rendered a report fixing compensation for the property at $1,345,000 and on October 6, 2004, the commissioners revised the report, increasing the amount to $1,348,000.

In September 2004, MCA appealed the commissioners' report to the Law Division. In December

2004, MCA moved in limine for a determination as to whether a 1977 consent judgment in *Robins v. Dep't of Env. Prot.*, Docket No. C-3461-75 (Ch. Div. May 5, 1977), (1) ran with the land; (2) controlled and established MCA's development rights for valuation/just compensation purposes; and (3) established that any subsequent environmental regulation would not limit those development rights in determining just compensation.

On March 29, 2005, the court entered an order granting MCA's motion in part and denying it in part. The order stated that the court found "as a matter of law that the 1977 Consent Judgment does not bar subsequent environmental regulations, specifically freshwater wetlands regulations, from being applicable to the property and the jury will be instructed accordingly." Paragraph three of the order stated that "MCA is entitled to offer the Consent Judgment into evidence and present testimony and argument to the jury that the Consent Judgment affects the determination of the fair market value of the property." The order further permitted MCA to move for leave to file a third party complaint against the DEP.

In April 2005, MCA filed a third party complaint against the DEP, alleging inverse condemnation and/or a regulatory taking of its property under state and federal law.

In September 2005, the DEP moved in lieu of an answer to dismiss the third party complaint. That

motion was denied and the DEP filed its answer to the third party complaint, denying liability and asserting affirmative defenses.

In February 2006, the DEP moved for summary judgment. That motion was denied in an order entered on March 3, 2006. The DEP moved for clarification and reconsideration. In an order entered on July 21, 2006, DEP's motion for reconsideration was granted and the third party complaint against the DEP was dismissed.

Thereafter, Montville and MCA "reached agreement as to the just compensation payable to [MCA] for the property acquired as set forth in the Complaint," valued at the time of the taking, and entered into a consent judgment on March 8, 2007. In accordance with 2007 the consent judgment, Montville agreed to pay MCA $2,648,500 as just compensation for the property, with credits for the amounts previously paid. MCA, however, reserved its right to appeal the March 29, 2005 order denying its motion in limine and the July 21, 2006 order dismissing the third party complaint against the DEP.

The 2007 consent judgment provided that if MCA did not appeal from the March 29, 2005 order, or if MCA appealed and we affirmed, the 2007 consent judgment would be final and binding on the parties. If MCA appealed the March 29, 2005 order, and we reversed, however, the 2007 consent judgment "shall be without prejudice to either party and shall be deemed inoperative."

Appendix A

On April 23, 2007, MCA filed a notice of appeal from the two orders and the consent judgment.

The property subject to the condemnation consists of forty-two acres, designated Lots 12 and 13, Block 138. MCA purchased the property in 1996 from James Nuckel. Nuckel, who was the president and principal of MCA, purchased the property in 1993 from the Bank of New York. Prior to that, the property was owned by Perry Robins and Irene Jacobs, brother and sister, who inherited it from their father in 1970.

In 1976, Robins and Jacobs filed a complaint against the DEP, the Township and the Township Tax Assessor, alleging inverse condemnation against the DEP based upon its application of flood control regulations which purportedly rendered the property unmarketable and undevelopable. Against the Township and tax assessor, Robins and Jacobs alleged that the assessed value of the property failed to take into account the limitations on development and potential marketability resulting from the DEP's flood control regulations.

In May 1977, the parties entered a consent judgment with the DEP. Neither the Township nor the tax assessor were parties to the 1977 consent judgment. In accordance with the 1977 consent judgment, the property was divided into two zones: west (zone one) and east (zone two) of the floodwater encroachment line, anticipating that there would be no development in zone one, and placing certain restrictions on any development in zone two consistent with the regulations in effect at

the time. With respect to possible future regulations, the 1977 consent judgment provided:

> 8. In the event that plaintiffs' rights with respect to the said property shall be affected by subsequent statutory modification by the legislature of the State of New Jersey, there is hereby reserved to plaintiffs such rights in condemnation or other rights as may be provided by law and this Judgment shall in no way be construed to affect any such rights of plaintiffs.

With respect to the effect of the 1977 consent judgment, it provided:

> 9. It is hereby further ORDERED:
>
> (a) That the terms of the within Judgment in its entirety may only be modified upon further Order of this Court pursuant to an amended Consent Judgment.
>
> (b) That the terms embodying the within Consent Judgment shall be subject to modification only by the consent of the parties as aforesaid or by the establishment of less stringent requirements through appropriate legislation.
>
> 10. This Judgment shall be recorded by plaintiffs within five days of the date of entry

> hereof with the Clerk of Morris County, it being the intention of the parties that the conditions contained herein shall run with the land, and said recording shall serve as notice to all the world as to the subject matter hereof.

When the consent judgment was entered, the DEP did not yet regulate wetlands. That regulation was controlled by the Army Corps of Engineers. *N.J.S.A.* 13:9B-2; *N.J.S.A.* 13:9B-27.

In support of its 2005 motion in limine, MCA submitted an affidavit of Bennett Stern, the attorney who represented Robins and Jacobs. Stern attested that he was involved in negotiating and drafting the consent judgment "to establish parameters within which the property owners would be permitted to develop the subject property." Stern stated:

> In entering into the Final Consent Judgment, the parties specifically anticipated the possibility of future enactments of environmental regulation, and included express language with regard to such possibility. Although the Consent Judgment does not differentiate between floodplains and wetlands, its terms were intended to cover all future legislative regulation that might impact the property owner's development rights.

Appendix A

According to Stern, only future environmental regulations that were "less stringent," in other words "permitting more development," would justify modification of the agreement. He further indicated that "the property owners would have rights in condemnation if future regulations restricted the use of the property." He interpreted the consent judgment as follows:

> In sum, pursuant to the Final Consent Judgment, the parties agreed that the property owners had the right to develop Zone 2 of the subject property without restriction except for the restrictions specifically enumerated in the Consent Judgment. Further, if future regulations affected the property owners' right to develop the subject property, the parties expressly reserved rights in condemnation to seek compensation for the right to develop the property to the extent permitted by the Consent Judgment.

Taking the 1977 consent judgment into account, MCA's appraisal expert valued the property at $8,275,000 as of August 24, 1999. That appraisal was based on contemplated construction of a 275,948 square foot multi-story office building, which would constitute the highest and best use of the property. This appraisal did not take into account any of the environmental regulations adopted since the 1977 consent judgment.

The Township's evaluation expert disagreed with MCA's interpretation of the 1977 consent judgment. The Township's expert argued that under the existing Freshwater Wetlands Protection Act, "over fifty percent of [the property] is wetlands or floodplain," which could not sustain the level of development proposed by MCA's appraiser.

In the mid-1990s, Nuckel contemplated construction of a 52,000 square foot retail shopping center on the property. He applied to the DEP for a letter of interpretation of the 1977 consent judgment to verify the jurisdictional boundary of the freshwater wetlands and waters and for a stream encroachment permit, a minor wetlands crossing permit, and a transition area waiver. The DEP granted the request and issued a letter of interpretation expiring in 1999, with the permit expiring in 2001. The approval specifically addressed the application for a 52,000 square foot project. The development plan never came to fruition, however, and the permit expired in 2001.

Against this background, MCA filed this appeal of the two orders and the consent judgment, arguing:

POINT I

THE TRIAL COURT ERRONEOUSLY DISMISSED [MCA]'S THIRD-PARTY COMPLAINT AGAINST NJDEP BECAUSE THE TOWNSHIP'S DIRECT CONDEMNATION OF MCA'S PROPERTY DID NOT PRE-

Appendix A

CLUDE AN ACTION FOR INVERSE CONDEMNATION BASED ON THE GENERAL CONSTITUTIONAL REQUIREMENT OF JUST COMPENSATION FOR A GOVERNMENTAL TAKING OF PRIVATE PROPERTY.

POINT II

THE STATE'S REGULATORY ACTION HAS INTERFERED WITH MCA'S INVESTMENT-BASED EXPECTATIONS AND CONSTITUTES A TAKING BY INVERSE CONDEMNATION.

A. The Environmental Regulations Enacted Subsequent To The 1977 Consent Judgment Had A Severe Adverse Economic Effect And Defeated MCA's Investment Backed Expectations.

1. With Regard To The *Penn Central* "Character Of The Governmental Action" Criterion, The State Action Causing The Taking Was Not Undertaken Pursuant To State Nuisance Law.

2. With Regard To The *Penn Central* "Economic Impact Of Regulation" Criterion, MCA Sustained Severe Economic Loss Due To The State's Actions.

3. Under The *Penn Central* "Economic Expectations" Criterion, The State's Conduct Has Substantially Interfered With MCA's Reasonable, Investment-Backed Expectations As To The Property.

B. The Existence Of An "Alternative" Economically Viable Use Does Not As A Matter Of Law Preclude A Taking As A Matter Of Law Under The *Penn Central* Analysis.

POINT III

THE TRIAL COURT ERRED IN DETERMINING THAT THE 1977 CONSENT JUDGMENT [WAS NOT INTENDED TO AFFECT] CONSIDERATION OF [ALL] SUBSEQUENT ENVIRONMENTAL REGULATIONS [FOR THE] PURPOSES OF DETERMINING JUST COMPENSATION TO BE PAID BY THE TOWNSHIP.

POINT IV

THE TRIAL COURT ERRED IN ITS IN LIMINE ORDER DETERMINING THAT THE 1977 CONSENT JUDGMENT DID NOT CONTROL FOR PURPOSES OF ASSESSING THE FAIR MARKET VALUE OF THE PROPERTY TAKEN BY THE TOWNSHIP.

Appendix A

A. The Consent Judgment Was Intended To Protect The Property Owner's Right To Compensation For Its Development Rights And Was Not Limited To Floodwater Or Flood Plain Issues As Demonstrated By The Uncontradicted Affidavit Of Bennett Stern, A Draftsman Of The Consent Judgment.

B. Relief From The Consent Judgment Under Rule 4:50-1 Is Not Appropriate Because The Possibility Of Later Enactment Of More Stringent Regulations Was Anticipated And, In Such Event, The Consent Judgment Required The Landowner To Be Compensated For The Loss Of Those Rights.

I

MCA appeals from the dismissal of its third party complaint against the DEP, arguing that the direct condemnation action against the Township does not preclude MCA's action for inverse condemnation because the two actions are separate and distinct with different remedies.

The trial court dismissed MCA's third party complaint against the DEP on the grounds that there could not be two condemning authorities. The court stated that because Montville took the property directly, it is not an inverse condemnation, and with "a direct condemnation. . . . the only question is value."

Appendix A

The Law Division reviewed the legal issues presented de novo. *Manalapan Realty L.P. v. Twp. Comm. of Manalapan*, 140 *N.J.* 366, 378, 658 A.2d 1230 (1995). The law recognizes both direct takings and takings by inverse condemnation. *Lingle v. Chevron U.S.A., Inc.*, 544 *U .S.* 528, 537, 125 *S.Ct.* 2074, 2081, 161 *L. Ed.*2d 886, 887 (2005); *Mansoldo v. State*, 187 *N.J.* 50, 58, 898 A.2d 1018 (2006); *Rieder v. State of N.J. Dep't of Trans.*, 221 *N.J.Super.* 547, 553, 535 A.2d 512 (App.Div.1987). A direct taking occurs when condemnation proceedings are affirmatively instituted with respect to a property, as with the Township's direct taking of MCA's property. *Lingle*, *supra*, 544 *U.S.* at 537, 125 *S.Ct.* at 2081, 161 *L. Ed.*2d at 887; *N.J.S.A.* 20:3-6; *Mansoldo*, *supra*, 187 *N.J.* at 58, 898 A.2d 1018.

In a direct taking, unless the condemnor specifies a lesser title in the complaint, the condemnor takes title to the entire condemned property "in fee simple, free and discharged of all right, title, interest and liens of all condemnees." *N.J.S.A.* 20:3-20.

Inverse condemnation occurs by virtue of governmental regulation that goes "too far." *Pa. Coal Co. v. Mahon*, 260 *U.S.* 393, 415, 43 *S.Ct.* 158, 160, 68 *L. Ed.* 322, 326 (1922); *Mansoldo*, *supra*, 187 *N.J.* at 58, 898 A.2d 1018. For example, governmental regulation results in an inverse condemnation when it "compel[s] the property owner to suffer a physical 'invasion' of his property" or when it "denies all economically beneficial or productive use of land." *Lucas v. S.C. Coastal Council*, 505 *U.S.* 1003, 1015, 112 *S.Ct.* 2886, 2893, 120

*L. Ed.*2d 798, 812-13 (1992); *Mansoldo*, *supra*, 187 *N.J.* at 58, 898 A.2d 1018.

"If the regulation does not deny all economically beneficial use under *Lucas*, then the determination whether the regulation otherwise constitutes a compensable taking is governed by the standards set forth in *Penn Central Trans. Co. v. New York City*, 438 *U.S.* 104, 98 *S.Ct.* 2646, 57 *L. Ed.*2d 631 (1978)." *Mansoldo*, *supra*, 187 *N.J.* at 59, 898 A.2d 1018. This is a fact-specific inquiry. "The rub, of course, has been—and remains—how to discern how far is 'too far.' " *Lingle*, *supra*, 544 *U.S.* at 538, 125 *S.Ct.* at 2081, 161 *L. Ed.*2d at 887.

Under *Penn Central*, the court's inquiry into whether there has been an inverse condemnation "turns in a large part, albeit not exclusively, upon the magnitude of a regulations' economic impact and the degree to which it interferes with legitimate property interests." *Lingle*, *supra*, at 544 *U.S.* at 540, 125 *S. Ct*. at 2082, 161 *L. Ed.*2d at 889. We must consider a variety of factors, including (1) "the economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action," for example, whether there has been "a physical invasion" of the property. *Penn Central*, *supra*, 438 *U.S.* at 124, 98 *S.Ct.* at 2659, 57 *L. Ed.*2d at 648.

Appendix A

Applying *Penn Central*, we have held that a claim of inverse condemnation is not substantiated unless the property owner has been "deprived of all or substantially all of the beneficial value of the totality of his property." *Orleans Builders & Developers v. Byrne*, 186 *N.J.Super.* 432, 436, 453 A.2d 200 (App.Div.), *certif. denied*, 91 *N.J.* 528, 453 A.2d 851 (1982). *See also Karam v. State of N.J. Dep't of Envtl. Prot.*, 308 *N.J.Super.* 225, 235, 705 A.2d 1221 (App.Div.1998) (determining that the court must consider "whether the regulation has deprived the owner of virtually all economically viable uses of the property.") *aff'd*, 157 *N.J.* 187, 723 A.2d 943, *cert. denied*, 528 *U.S.* 814, 120 *S.Ct.* 51, 145 *L. Ed.*2d 45 (1999); *East Cape May Assocs. v. State of N.J. Dep't of Envtl. Prot.*, 300 *N.J.Super.* 325, 336-37, 693 A.2d 114 (App.Div.1997) (holding that inverse condemnation occurs when regulations deny economically viable use of property and property owner had investment-backed expectations supported by state property law); *Pinkowski v. Twp. of Montclair*, 299 *N.J.Super.* 557, 575-76, 691 A.2d 837 (App.Div.1997) (holding that inverse condemnation requires showing that government "substantially impaired the land owner's use of the property").

Lesser effects on the property will not suffice to establish inverse condemnation. *Gardner v. N.J. Pinelands Comm'n*, 125 *N.J.* 193, 210-11, 593 A.2d 251 (1991) (holding that impairment of marketability and restrictions on uses do not necessarily result in takings although they may reduce income or profits).

Appendix A

The Freshwater Wetlands Protection Act imposes standing and exhaustion of remedies requirements for individuals claiming inverse condemnation as a result of the regulations. *N.J.S.A.* 13:9B-22. An exhaustion of remedies requirement, however, may be waived when there is only a question of law to be resolved; the administrative remedies would be futile; irreparable harm would result; jurisdiction of the agency is in doubt; or the public interest warrants prompt judicial action. *Abbott v. Burke*, 100 *N.J.* 269, 297-98, 495 A.2d 376 (1985); *N.J. Civil Serv. Ass'n v. State*, 88 *N.J.* 605, 612-13, 443 A.2d 1070 (1982); *Garrow v. Elizabeth Gen. Hosp. & Dispensary*, 79 *N.J.* 549, 561, 401 A.2d 533 (1979).

MCA cites no New Jersey cases in support of its claim that it should be permitted to pursue its inverse condemnation action against the DEP along with its challenge to the Township's direct condemnation action. Rather, MCA relies on out-of-state cases that are factually distinguishable from this case and do not warrant further discussion herein.

In our view, MCA lacks standing to assert its inverse condemnation claim because it did not have title to the property when it filed the complaint. "Standing requires that a litigant have a sufficient stake and real adverseness with respect to the subject matter of the litigation, and a substantial likelihood that some harm will fall upon it in the event of an unfavorable decision. *In re N.J. Bd. of Pub. Utils.*, 200 *N.J.Super.* 544, 556, 491 A.2d 1295 (App.Div.1985). Title and ownership of the

property passed to the township in November 2002, when the township filed the declaration of taking. *N.J.S.A.* 20:3-21; *see also Carroll v. Newark*, 108 *N.J.L.* 323, 328, 158 A. 458 (E. & A.1932). Since MCA did not contest the township's right to take the property—challenging only the amount of compensation owed—title would not revert to MCA unless the Township abandoned its exercise of eminent domain, which has not occurred. *N.J.S.A.* 20:3-22. Consequently, MCA lacks standing to pursue an inverse condemnation against the DEP.

II

MCA next argues that the trial court erred in denying its motion in limine with respect to the 1977 consent judgment. In essence, MCA argues that under the terms of the 1977 consent judgment, it is entitled to just compensation for the property, based upon the development rights protected by the 1977 consent judgment, irrespective of any subsequent environmental regulations that may have further limited development rights on the property.

MCA maintains that the DEP is obligated to pay the difference in the property's value between the 1977 consent judgment and the date of the township's taking resulting from the State's adoption of more stringent environmental regulations. Alternatively, MCA argues that if we preclude its inverse condemnation action against the DEP, the township is responsible for paying the differential in the property's value between the 1977

consent judgment and the time of the taking, in addition to the amount the township previously paid pursuant to its consent judgment.

We have carefully considered the record with respect to MCA's arguments on these issues and we are satisfied that they lack sufficient merit to warrant extensive discussion in this opinion. *R.* 2:11-3(e)(1)(E). Nevertheless, we add the following comments.

The trial court correctly held that the township was obligated to pay just compensation to MCA, calculated as the fair market value of the property at the time of the taking with the jury permitted to consider the effect of the 1977 consent judgment as interpreted by the court. The township paid just compensation to MCA pursuant to the 2007 consent judgment from which MCA has no right of appeal.

With respect to the DEP, we have already indicated that MCA's inverse condemnation action failed for lack of standing. MCA cannot pursue a claim against the DEP for breach of the 1977 consent judgment because MCA did not allege such a claim in its third party complaint—it alleged only inverse condemnation claims.

The 1977 consent judgment was a settlement agreement between the DEP and Robins and Jacobs. *Fox v. U.S. Dep't of Hous. & Urban Dev.*, 680 *F.*2d 315, 319 (3d cir.1982). The consent judgment did not address wetlands regulations, which in 1977 were enforced by the Army Corps of Engineers, nor did it prevent

application of more stringent environmental regulations to the property in the future. Indeed, at paragraph eight, the 1977 consent judgment expressly anticipated the possibility of more stringent regulations in the future. Paragraph nine merely precludes modification of the terms of the judgment, except under limited circumstances. We agree with the trial court that to limit the application of the agreement to then—existing statues and regulations would be "contrary to public policy. . . . [a]nd that could not have been the intent of the consent judgment." "When one interpretation of a contract would render it legal, and another illegal, the courts will adopt that construction which will not impute to the parties an intention to violate the law." *Kelly v. Guar. Trust Co.*, 114 *N.J.Eq.* 110, 115, 168 A. 413 (E. & A.1933); *see also N.J. Bank v. Palladino*, 77 *N.J.* 33, 46, 389 A.2d 454 (1978) (holding that "when the terms of an agreement have more than one possible interpretation, by one of which the agreement would be valid and by the other void or illegal, the former will be preferred").

With respect to the evidentiary value of the 1977 judgment, we agree with the trial court's finding:

> [I]t is something that a willing buyer . . . would consider in terms of negotiations with the DEP, for example . . . what would be determined in terms of permits. Certainly, there are arguments that could be made that in settling development of the property and wetlands and what can and can't be

developed, that you'd be sitting down with the DEP and looking at the fact that there was this consent judgment, as well as the subsequent wetlands regulation. And that's a subject for negotiation that may or may not produce results with the DEP, but we don't need to worry about that because that's speculation.

But we do—it is something that's evidentiary for the jury to consider. And they can determine in terms of value whether that has any effect. They may determine, though, the wetlands would bar any subsequent development in terms of the larger office building here. Or they may say, well, we think there is some value to that because they could negotiate with the DEP in that regard.

So that is the subject, I think, for the jury to hear. But the jury has to be charged that the 2 77 judgment does not bar subsequent wetlands regulation. However, the 2 77 judgment is still in effect. And that is something that is a matter of negotiation with the DEP in terms of overall value.

Although the terms of the 1977 consent judgment run with the land, the consent judgment does not give MCA the right to receive any compensation from the Township, other than what the general law of condemnation requires. Nothing in the 1977 consent

judgment supports MCA's right to be compensated by the township for the loss in property value caused by the application of more stringent environmental regulations adopted after the consent judgment but before the date of the taking.

We affirm the trial court's order for the reasons stated herein.

APPENDIX B — EXCERPTS OF TRANSCRIPT OF PROCEEDING OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CIVIL PART, MORRIS COUNTY DATED JULY 21, 2006

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CIVIL PART
MORRIS COUNTY
DOCKET NO.: MRS-L-3718-02
APP. DIV. NO. _____

TOWNSHIP OF MONTVILLE,

Plaintiff,

vs.

MONTVILLE CENTER ASSOCIATES, L.P., Et. Al.,

Defendants.

Place: Morris County Courthouse
Washington and Court Streets
Morristown, NJ 07963-0914

Date: July 21, 2006

B E F O R E:

HONORABLE B. THEODORE BOZONELIS, A.J.S.C.

Appendix B

[Commencing at page 14]

. . . ruling now on the motion for reconsideration. Based upon the Court's review of the April 27th, 2006 transcript, as well as the February 25th, 2005 transcript, which started all of this with respect to the arguments of counsel. And I think to clarify for both sides what the transcripts say, as well as the reasoning of the Court, I want to go back to where we first started, and go right through to where we are now, and I think doing that will give the parties the opportunity to have the full reasoning of the Court, and, of course, that is a record that will be available to all parties on this matter.

As you know, back on February 25th, 2005, this matter came to me on a motion in limine with respect to the 1977 consent judgment, that was entered into by a predecessor entitled to MCA, Montville Center Associates, Perry Robbins (phonetic) and Irene Jacobs, and the DEP. And what was put before the Court was the fact that this consent judgment, this 1977 consent judgment that had been entered into by the parties was recorded, ran with the land, and effected the property which was taken by Montville, and now was going to be the subject of a condemnation trial because the commissioner's evaluation had been appealed by MCA seeking a jury trial on condemnation.

[15] And before the commissioners, the 1977 consent judgment came up, and it was argued to the Court that the commissioners considered that. And the positions of the parties in that respect were diametrically

opposed, That is, MCA was taking the position that they could fully develop their property by virtue of this 1977 consent judgment, and essentially, and I'm rounding off numbers now, but essentially put a 250,000 square foot office building or something along those lines on this property, and that they have had that protection pursuant to the 1977 consent judgment in that regard by virtue of the two zones that were established under that consent judgment.

Condemning authority, Montville, took the position that that simply is not the case. That subsequent to this consent judgment, and this was a consent judgment only between predecessor entitled to the MCA and the DEP, was the Fresh Water Wetlands Act, which the DEP eventually became the overseeing governmental agency on, and that this consent judgment did not apply to wetlands, and that by virtue of the wetlands we could only develop now on the property approximately a 50,000 square foot building.

So, obviously, there was a great difference [16] in valuation between what the owner of the property, MCA, was seeking, and what the condemning authority was saying. That's how this matter came to me. It was a motion in limine. But what it did do is it asked the Court to interpret the consent judgment. And that's exactly what I did. And I made a finding as a matter of law with respect to that consent judgment. Because what was being argued to the Court in the motion in limine by MCA was, look, there's facts here. There's material facts.

The attorney at the time, Mr. Bennett Stern, we're giving you his affidavit. It was meant to cover all regulations, any subsequent regulations, and that the DEP would be bound by this. And even if there were subsequent regulations that they made this — this settlement by virtue of the inverse condemnation plan we had filed against the DEP. They were bound by it. They can't prevent us from building that 250,000 square foot office building, and they're liable by virtue of the fact that no subsequent regulations can apply, and affidavits were being submitted saying that that was the intent of that consent judgment.

I looked at all of that, and determined that the matter could be resolved as a matter of law. It didn't have to have a — a factual interpretations with [17] respect to the consent judgment. And the Court reasoned in that regard as set forth in the transcript of the February 25th, 2005 hearing in that respect. And I understand that the MCA does not agree with the Court's reasoning in that regard, and has been constantly referring to a differential that may be due here. But let's look at what the Court concluded at time of the February 25th, 2005 transcript.

And it really starts on Page 30 of the transcript. Lays out the history of the property, and then comes to the consent judgment, and I indicate on Page 32, and now the consent judgment itself, I've had the opportunity to review that judgment, and the Court notes two major points.

Appendix B

First of all when the DEP entered that judgment it was not responsible in any way for the regulation of wetlands. That's a very clear statement that I'm making, Now The MCA may disagree with that, but there's no question what I ruled in that regard. It wasn't contemplated, I said, in 1977 that it would be a responsible state agency for wetlands.

The army corp of engineers, as we know, was responsible for wetlands at the time, and they were not a party to this judgment. So clearly what the Court was saying is, this is a judgment that concerns flood [18] water management. It is not a judgment dealing with wetlands. That was the first finding that I made.

And I say on Page 32 and 33, and it emphasized flood plains and flood water encroachment lines, dividing the property into two distinct areas, one of which development would be barred, and another in which development permitted in that regard, and there were specific requirements in terms of the construction laid out in that area too. And I indicate the line of demarcation, and go through the judgment in that regard. And I've made the finding so that the nature and subject matter of the consent judgment was specific to flood water control and regulations, It did not discuss or contemplate other types of land use limitation and environmental restrictions.

And then I indicate the only language that really relates to that — the argument of MCA was Paragraph 9D. I go on to a discussion of Paragraph 9B, and then

go on to emphasize the fact that this simply couldn't apply to wetlands regulations, and this is all laid out in Page 33, 34, and then I look at Paragraph 8, in which I indicate on — on Page 35, that it's reserved to the plaintiff such rights and condemnation or other rights that may be provided by law, and this judgment shall in no way be construed to effect such [19] rights.

Now what that means is, by virtue of subsequent regulations, they may have an inverse condemnation claim if they sought to bring it, okay, in — in that regard, But that it certainly wasn't an interpretation with respect that the MCA was seeking that any subsequent regulations could not be applied to them in — in that regard. So the Court concluded with respect to this issue that it would be the interpretation that the landowner was seeking, and MCA was seeking, was overly broad and simply could not be sustained.

Now and that it did not mean when it talked about less stringent regulations that no other regulations would apply in that regard. And I indicate on Page 35, and that simply is not the intent of the 1977 consent judgment in terms of the language, and that is what I am interpreting in that regard.

So I think we have to start with the fact that because the MCA continues to make these arguments about liability for a differential and the like, that the only, as far as the Court's interpretation is concerned, the only issue deals with flood water management, and that that was the finding that the Court made, not subsequent

regulations in that regard [20] with respect to wetlands or differentials with respect to the fact that the argument, I take it, of the plaintiff — excuse me — of MCA is that, well, the DEP could be liable for the differential because there's the differential between the wetlands regulations and — and what occurs here, because Montville is going to introduce that, and we have a judgment which doesn't allow that. So that there would be this differential, but I don't know how much clearer I could have made it with respect to my ruling that there is no such differential. It doesn't exist as far as this Court is concerned.

Now MCA will have their rights of appeal with respect to the Court's decision. You have my transcript of — of the April 2005 hearing. I don't think I could have made it any clearer than that, and I certainly have clarified it today. There simply is no differential to be concerned about in that regard.

Now during the course of the colloquy on April 25th of 2005, it was raised before the Court that, well, Judge, this consent judgment met — even though you've made this ruling, this consent judgment was argued to the commissioners, and I engaged in a colloquy with MCA counsel, and said, well, are you saying to me that you'd like to present this to the [21] jury. It should be presented to the jury that it runs with the land, and the answer was a yes in — in — in that regard. And I raised it also at that time with not only Mr. O'Connor and Mr. Drasco, but also Mr. Usteick (phonetic) who was here at that time, and Mr. Usteick agreed, yes, it should be presented to the jury.

So I indicated that I've made my finding. My finding is that wetlands regulations can be presented to the jury in this regard. They're not barred. I disagreed with MCA. I actually interpreted the consent judgment, made a ruling on the consent judgment in that regard. And then indicated it runs with the land, it's a judgment, has been modified, hasn't been vacated. Both sides agree it should be presented to the jury, so let — it's evidentiary. Let it be presented to the jury. The jury can determine what, if any, effect it has with respect to flood water control. That the DEP is basically entered into a consent judgment as a — as a result of a reverse condemnation action, basically saying with respect to flood water control in that regard, that we wouldn't have any further regulation, and you can build in that respect.

And, of course, as I indicated in the colloquy during the April, 2005 hearing, the jury can [22] decide what emphasis to place on that based upon the appraisers say, and the fact that permits have to be obtained from the DEP, and what relevance the DEP would put on it, and can determine what that — whether that is evidential in terms of the overall value to be determined here.

But clearly the Court indicated that there is a difference between flood water control now governed under the Flood Hazard Area Control Act, and the Freshwater Wetlands Act in 1986. That came about in 1986 in that regard. The only overlay is that it turns out that the DEP is controlling not only flood water control now, but also the wetlands, which it wasn't doing back in 1977 in that regard.

So I understand that MCA, of course, is concerned with the Court's ruling, and disagrees with the Court's ruling in that regard, but I don't think I could have made it any more specific what my finding was in that respect. So when — if it's being argued to the Court that there is some differential of value that there may be liability for, I don't know where that would come based upon my ruling on the consent judgment.

Now having said that back — what happened in 2005, we then subsequent to that had the Court's motion [23] for reconsideration in April 27th of 2006. And in that respect the Court — I want to find the specific pages here — the Court on Page 60, with respect to these arguments on the consent judgment, indicating — and this is what I'm failing — this is in response to Mr. Drasco's statement with respect to expert's reports that were done, and the consideration of the consent judgment, and the Court indicating and saying, and that is what I'm failing to understand, because I'm not changing my ruling on that. The ruling doesn't change. It's the same ruling I've always made. The only difference is whether there should be another party in the case, the DEP has another governmental authority. I have never changed my ruling on what the consent judgment means.

Now I — I don't think I could be any clearer in — in that regard. So what happened was, with respect to the motion for reconsideration, is the DEP comes in by virtue of being made a party because of the third party — excuse me — because of the consent judgment, and

the fact that it was going to be considered by the jury. And the Court indicating that, well, we did have this interpretation. There are —there are — if nothing else, contractual liabilities on the judgment on the part of the DEP. They should be [24] made a party, and that's when I indicated that some of the colloquy in that regard the Court had overanalyzed the situation, and wasn't focused on the fact that we'd have two condemning authorities here, and Ms. Conklin correctly pointed out, I think, to the Court, that this simply cannot be, and I agree with that.

It simply cannot be in that respect, because Montville directly took this property. It's not inverse condemnation. It's — it's a direct condemnation. They took the property. The only question is value, and the only issue on a motion for in limine is what is that consent judgment mean, and I interpreted it.

So in that respect the DEP does not belong in this case, for the reasons I've articulated back in on April 27th, and for the reasons I'm stating today. So to the extent that the complainant is raising inverse condemnation claims or condemnation-type claims against the DEP, I am reconsidering that, and agree with the position of the DEP, and they're dismissed in that regard.

Now — then we got into this colloquy about, well, we still have a consent judgment, Judge. And the consent judgment is not only evidential in the condemnation case, but it has rights with it, which [25] takes me back to the

consent judgment itself, and Paragraph 8 of the consent judgment, because it's never been modified, It's never been vacated in that regard, and there was a reservation of rights, which, of course, is their rights in any case, indicating that the plaintiffs have the right in condemnation or other rights, as may be provided by law, and this judgment shall in no way be construed to effect such rights.

So there are rights in this judgment, and if there are any rights in the judgment, they apply to flood water control, because I've already — I've already interpreted the consent judgment in that regard way back when. I never changed the ruling in that respect.

So that what I indicated in April 27th is I haven't ruled on that issue, and that issue is bifurcated. It shouldn't be part — it's not part of the condemnation, and if you wish MCA to raise arguments in that regard, you need to file a motion to — to have another count in the third party complaint, and Ms. Conklin stood up and indicated that just cannot be, Judge, for all the reasons that I've stated. And I said I've heard your arguments, but I'm going to give MCA the opportunity to make their arguments in that regard, and Ms. Conklin, on behalf of the DEP, you'd [26] have the right to respond, and then I will make a formal ruling in that regard.

So we have a consent judgment. It hasn't gone away. The arguments in terms of what the rights are, I don't know what MCA is going to say in that regard, but I do know that if they come before me on a motion and say

we want to have a count on a contractual right that the DEP is bound by regulations, any other regulations that applied after 1977, and cannot apply to this property, and we have a judgment in that regard, I'm going to be granting summary judgment to the DEP, because I've already ruled on that issue, It simply is not what the Court believes the consent judgment stands for. The army corp of engineers wasn't even a party to that action, and they controlled wetlands. It only applies to flood water control. That's what the judgment applies to.

So to the extent that MCA believes they may have some surviving rights in that regard, and wishes to make an argument to the Court that on flood water control there — there cannot be any further regulation imposed on them by the DEP with respect to their — to the inverse condemnation claim in that regard, and they wish to raise that issue, I don't know what they're going to say. I — I simply don't know what arguments [27] would be made by virtue of the fact that as Mr. Drasco has correctly pointed out, but I think it's true, by virtue of the Court's ruling on — in April of 2005, I basically gutted all of that out. I mooted it. There's really nothing left in that regard, and that's Ms. Conklin's argument in addition to her argument that it's gone. Montville took the property over. It's gone.

So what I said was back in April, I'm not ruling on that. I don't know what creative analysis is being offered by MCA in that regard, but I can give you direction that if you're going to come back to me with what has been

described as a differential argument, I've already ruled on that issue. You may not like the ruling. It's the same ruling I made in April of 2005. It's never changed. That's the ruling of the Court. I simply do not believe that consent judgment binds the DEP in any respect with respect to other governmental regulations other than flood water control.

MS. CONKLIN: Quick question?

THE COURT: Yes.

MS. CONKLIN: If I may? Why wouldn't the issue of how the flood regulations impact this property, why wouldn't that issue be addressed by their extra witness in the context of this condemnation?

[28] THE COURT: And that's exactly what I said, Ms. Conklin.

MS. CONKLIN: Oh, okay. All right,

THE COURT: That that should be raised

MS. CONKLIN: So that —

THE COURT: — in the — in — in — and it's — evidential in the hearing. That's exactly right.

MS. CONKLIN: All right.

THE COURT: And that was one of the reasons I said to Montville are you taking a position that somehow

the DEP was reliable in that regard, and they said, no, it's their liability. So I turned to Mr. Drasco, and I said, how are you prejudiced.

MS. CONKLIN: Yeah.

THE COURT: You're going to raise all of these issues except for the ruling that the Court made, which was wetland — it doesn't apply to wetlands.

MS. CONKLIN: Uh-huh.

THE COURT: So the very issues that we're talking about are going to be before the jury. So I don't know what would survive on any separate count,

MS. CONKLIN: Well, that —

THE COURT: I don't know what Mr. Drasco's thinking in that regard, but what I said back in April was if you want to make a motion to me, you can. You'd [29] have the right to — to — to object to it. But I think now that I've clarified this for everybody I — I think it's all mooted out by virtue of what I found back in April of 2005.

MS. CONKLIN: Uh-huh.

THE COURT: I — I don't know if I can make it any clearer than that, but I think it got overly complicated when we brought the DEP in, and we started focusing on — on the DEP's liability when we shouldn't have been.

MR. DRASCO: Your Honor, I don't think you can make it any clearer, I — I don't, respectfully, agree, but —

THE COURT: Yes. No, I understand.

MR. DRASCO: — it's clear to me that if I made a motion to amend the third party complaint and allege that we're entitled to — to damages for breach of contract under Paragraph 8.

THE COURT: In your interpretation of it.

MR. DRASCO: But based upon the — the damages resulting from the subsequent regulations under the Freshwater Protection Act, that that motion would be denied.

THE COURT: That's correct. And — and the reason is it goes back to the April 25th, 2005 ruling [30] that I've made. You — you recall back at the end of the April 2006, the —— the April hearing, I said to you, Mr. Drasco, I believe I've ruled on all those issues. Look at the transcript. I — I think that —and you provided the transcript to me. We've had the opportunity to review the transcript. I don't think the transcript could have been any clearer in — in that regard as to what I ruled, and I — and you, of course, will have your rights of appeal in that regard. But that was the finding of the Court from over a year ago. It's never changed.

MR. DRASCO: With respect to the trial that's now scheduled, you know, we've had some time lag since we were here in April.

THE COURT: Right.

MR. DRASCO: And we submitted our expert report sometime ago, and Montville, I think, was waiting to — — to hear your Honor's ruling on this issue before submitting expert reports. I think we need to look at the trial date in the context of when Montville can get its expert reports in, so that we, you know, we can respond and — and get ready for trial.

THE COURT: Well, let's talk about timing in that regard. Do you have an actual trial date that's been —

[31] MR. DRASCO: September 11th.

THE COURT: September 11th. Okay. So — so let's take a look at that,

MR. BRYCE: Perhaps your Honor, if I may. We have not yet responded with our expert report. We have not produced that yet, I would have no objection to giving Mr. Drasco an opportunity to have his expert revise his expert report in consideration of the ruling. I know that his — in this particular instance his expert gave two different opinions based upon the value with total development rights versus development rights with freshwater wetlands.

THE COURT: Did he do that after my September 2005 ruling?

MR. DRASCO: Yes. After your Honor — after the DEP became a party of the case.

THE COURT: Okay.

MR. BRYCE: So I — I really, I don't want to have Mr. Drasco necessarily locked into that bifurcated analysis with his expert. It may become more confusing. If he would like to —

THE COURT: Well, tell me what you want to do in that regard.

MR. DRASCO: Judge, just so we don't delay this any further. I mean, I — we may want to take a [32] look at that, but I think we can do that in terms of rebuttal.

THE COURT: Okay.

MR. DRASCO: And I think the next step would be for Montville to come to a — a determination of whether you're going to use the commissioner's experts, whether they're going to amend their report at all, and then get that to us. And then maybe we can have a —

THE COURT: So how much time do you need?

MR. BRYCE: I believe that expert report will be forthcoming. We based —

THE COURT: Well, tell me. Because if I'm going to put it in the order —

MR. BRYCE: I think within the next two weeks Mr. Omlin (phonetic) will be able to produce it, so —

THE COURT: Well, okay. As a —

MR. BRYCE: And I've been — I've been putting some pressure on him to actually get it, so he said he was going to have it for me today, but was unable to do that.

THE COURT: Let's see, it's now — we're talking about July 21, so we'll say by — by August 14th. How's that?

MR. BRYCE: That's fine, your Honor,

THE COURT: All right. August 14th, and then [33] let me just summarize what we're — what we're doing in this order.

First the motion for reconsideration for the DEP is granted, and they are dismissed in the third party complaint for all the reasons stated on the record. The — the expert's report for Montville will be due by August 14th.

And then for rebuttal or reply, Mr. Drasco, what do you need in that regard?

MR. DRASCO: Only because we're in the last two weeks away, can we still have 30 days, your Honor?

THE COURT: Okay. So we're talking about —why don't we say instead of September 14th, why don't I give you until September 25th. Okay?

MR. DRASCO: All right, Fine.

THE COURT: And then you — do you need any further depositions or anything, you may —

MR. DRASCO: Only — well, I don't know whether or not the — the Township wants to depose our experts. We have a different engineer than was testified at the commissioner's hearing. The appraiser is the same. The report is — is different. And I don't know — without — without seeing the — the Township's reports, I don't know whether or not there are different experts or different theories that we [34] need to —

THE COURT: Okay. So deposition of experts to be completed by the end of October, how's that?

MR. DRASCO: That's fine.

THE COURT: Okay. By October 30th. All right. And then I'll give you a new trial date for November 13th. How's that? November 13th calendar? November 6th calendar? What would you like?

MR. DRASCO: I'm going to be traveling to with the state bar, your Honor.

THE COURT: All right.

MR. DRASCO: If we could have a little time that, maybe the first week of December?

THE COURT: All right. The December 4th calendar will be your trial date. Okay?

So can somebody prepare the order for me here with these dates in it?

MS. CONKLIN: Your Honor, if I may. I have an order that essentially does just — just with respect to our motion —

THE COURT: Oh.

MS. CONKLIN: — what your — what you just said.

THE COURT: Yeah. I can add the dates.

MS. CONKLIN: It just grants the motion, [35] dismisses the third party complaint with prejudice.

THE COURT: All right, Can you do a separate scheduling order for them.

MS. CONKLIN: Yes. That makes sense to —

MR. BRYCE: That's fine.

THE COURT: You'll do that Mr. Bryce, and I'll enter your order, Ms. Conklin. Okay?

MS. CONKLIN: All right. Let me — obviously — by all means, just please take a gander at it.

THE COURT: Okay.

MR. DRASCO: There's no — no issue with the two —

THE COURT: All right.

MR. DRASCO: — paragraphs, but I —

THE COURT: I'll enter that order,

MR. DRASCO: All right.

THE COURT: Yeah.

MR. DRASCO: But I — I think that there is — the recitals that precede it, are unnecessary, and — and in some extent in conflict with the procedural history your Honor's ruling is. I — I think it would just be easier if we — we submit a new order, which includes everything.

MS. CONKLIN: Well, your Honor, I — I this is my proposed order, so if you have something, by [36] all means allow me to see it in writing, and we'll work on it. I have an order here that basically — I — I would submit it to —

THE COURT: Well, what's the difference?

MS. CONKLIN: — the Court right now, and ask you to read it, because it's simple, and I just — I've been trying —

MR. DRASCO: Well, the two worded paragraphs are simple, but the page and a half that precedes it is not.

MS. CONKLIN: Your Honor, I'd — I'd ask that you'd just take a minute right now to read this, and tell me that that's not in any way inaccurate, I would like to know.

MR. DRASCO: My proposal is as follows, your Honor.

THE COURT: All right.

MR. DRASCO: On Page 2, second full paragraph, after the words, "And the Court having rendered a preliminary decision from the bench at conclusion of oral argument on April 27," strike the rest and add, "and for the reasons set forth on the record on July 21, 2006."

THE COURT: All right. Do you have any problem with that?

[37] MS. CONKLIN: Your Honor, I — I really want the — the answer is, yes, I do, I really do. It's —I'm trying desperately to simplify what has — there's a lot

of verbiage here, and what I'm desperately trying to do is to focus just on two simple propositions that the only thing that's pending here is the value of the property that the Township has to pay for, and the fact that we're not involved in that. That's all this order is establishing.

Of all the peripheral stuff about the value, and the meaning the '77 consent judgment is not my problem or part of my motion. And that's why this —this order is so — you can't change it in any way other than to confuse it.

MR. DRASCO: Therefore, why say anything other than for the reasons set forth by the Court on the record.

MS. CONKLIN: Because this is — this is the guts of the motion. If this doesn't work, then we're back to arguing from square zero.

THE COURT: I disagree with you on that. I mean, you did — look, the DEP's motion was granted —

MS. CONKLIN: I mean, you know, that's —

THE COURT: — and you've been dismissed from the complaint. I don't know what other relief you want [38] in that regard,

MS. CONKLIN: I know. No, your Honor. My relief, that's never been —

THE COURT: And the statement of reasons on the record are the statement of reasons, so I agree with Mr. Drasco in that regard, So I'm just —

MS. CONKLIN: Okay.

THE COURT: — I'm going to make that change that he suggested for the reasons stated on the record. Okay?

What was it you said? And for after April 27th, 2006?

MR. DRASCO: After — "And the Court having rendered a preliminary decision from the bench at the conclusion of oral argument on April 27th, 2006, and for the reasons stated on the record at the time of argument on July 21, 2006," and then strike the rest until you get to "and for good cause shown."

THE COURT: What do you mean "for good cause?" What's wrong with the other paragraphs? And the Court having deferred entry of final order, and the Township having stated — I think that's okay. And in consideration of the written submissions. That's okay, And further stated on the record on July 21.

What would be wrong with those paragraphs?

[39] MR. DRASCO: Well, there's nothing wrong with the paragraph and the Court having entered deferred entry.

THE COURT: Yeah.

MR. DRASCO: So as to before the Township. The next paragraph I take issue was with —

THE COURT: I believe —

MS. CONKLIN: The town — well, your Honor, does the Township have issue with it? I'm characterizing their — their submissions.

MR. DRASCO: I don't — I don't think we need to characterize what the Township said. It's on it's part of the record.

THE COURT: I think we can leave that in. I think that's exactly what they did say in the motion. Anything else?

MR. BRYCE: I agree, our Honor.

THE COURT: I'll give you copies of the order.

MS. CONKLIN: Very good. Thank you, your Honor.

THE COURT: And today you'll wait for copies of this order. Okay. And then we'll have the scheduling order. We have the statement of reasons on the record today, in which I've reclarified everything, [40] I regret to all the parties that it got complicated by our colloquy with respect to liability of another governmental entity. It was never the intent of the Court to change its ruling

back on April 25th, 2005. And to the extent that anyone was confused by that, I regret that, and I'm sorry that that occurred. Okay?

So we'll give you a copy of this particular order. All right? And if you'll come right in through those doors there —

(No further proceedings recorded.)

APPENDIX C — ORDER OF THE SUPERIOR COURT OF NEW JERSEY, MORRIS COUNTY, LAW DIVISION DATED AND FILED JULY 21, 2006

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Attorney for Defendants State of New Jersey
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By: Amy C. Donlon
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SUPERIOR COURT OF NEW JERSEY
MORRIS COUNTY – LAW DIVISION

DOCKET NO. MRS-L-3718-02

Civil Action

TOWNSHIP OF MONTVILLE,

Plaintiff,

v.

MONTVILLE CENTER ASSOCS., LP, et al,

Defendants,

Appendix C

-and-

MONTVILLE CENTER ASSOCS., LP,

Third Party Plaintiff,

v.

STATE OF NEW JERSEY,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and BRADLEY M. CAMPBELL,
Commissioner,

Third Party Defendants.

ORDER GRANTING THIRD PARTY DEFENDANTS' MOTION FOR CLARIFICATION AND RECONSIDERATION AND DISMISSING THE THIRD PARTY COMPLAINT

This matter having been opened to the Court by Zulima V. Farber, Attorney General of New Jersey, attorney for Third Party Defendants State of New Jersey, Department of Environmental Protection and its Commissioner, by Amy Donlon and Barbara Conklin, Deputy Attorneys General, seeking an order dismissing the Third Party Complaint against the State defendants brought during this challenge to a monetary award of Condemnation Commissioners to Montville Center Associates LP ("Condemnee") arising from a condemnation of property by the Township of Montville ("Condemnor");

Appendix C

And the Court having considered the papers submitted by the moving parties and the opposing party, third party plaintiff, and the oral argument of counsel on April 27, 2006;

And the Court having rendered a preliminary decision from the bench at the conclusion of oral argument on April 27, 2006 [and for the reasons stated on the record on July 21, 2006] ~~that the only issue before the Court in this condemnation case was the value of the property condemned by the Township, that is, the amount of money owed by the Township to the condemnee in compensation for the property condemned by the Township and that NJDEP was not a proper party in this litigation;~~

And the Court having deferred entry of a final order so as to afford the Township the opportunity to submit its written position on State Defendants' motion;

And the Township having stated in its May 12, 2006 written submission that it believes that neither NJDEP nor its Commissioner is financially liable to the Condemnee or the Township-Condemnor in this matter arising from the Township's condemnation of the property in question;

And in consideration of subsequent written submissions from third party plaintiff and third party defendant, and oral argument on July 21, 2006;

And for good cause shown;

Appendix C

IT IS on this 21st day of July, 2006;

ORDERED that the Third Party Defendants' Motion for Clarification and Reconsideration is granted; and it is further **ORDERED** that Third Party Plaintiff's Complaint against the State of New Jersey, Department of Environmental Protection and its Commissioner is dismissed with prejudice.

IT IS FURTHER ORDERED that a copy of this Order shall be served upon all parties hereto [today].

s/ B. Theodore Bozonelis
B. Theodore Bozonelis, A.J.S.C.

In accordance with R. 1:6-2(a), this motion was opposed by Third Party Plaintiffs.

Oral Argument was heard on April 27, 2006 and July 21, 2006.

APPENDIX D — ORDER OF THE SUPREME COURT OF NEW JERSEY DENYING PETITION FOR CERTIFICATION DATED NOVEMBER 12, 2008 AND FILED NOVEMBER 14, 2008

SUPREME COURT OF NEW JERSEY
C-378 September Term 2008
63,237

TOWNSHIP OF MONTVILLE,

Plaintiff-Respondent,

v.

MCA ASSOCIATES, L.P.,

Defendant-Petitioner,

and

DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, et al.,

Defendants-Respondents.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4327-06 having been submitted to this Court, and the Court having considered the same;

Appendix D

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 12th day of November, 2008.

s/ Stephen Townsend
CLERK OF THE SUPREME COURT

125 (2)

No. 08-1016

In The
Supreme Court of the United States

MCA ASSOCIATES, L.P.,
Petitioner,

v.

TOWNSHIP OF MONTVILLE, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, AND THE COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COURT RULES CITED

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

Petitioner MCA Associates asks this Court to review a New Jersey Supreme Court decision, Township of Montville v. MCA Associates et als., 197 N.J. 14 (2008), declining review of an unpublished Appellate Division case (Pa1-Pa22)[1] holding that Petitioner could not raise an inverse condemnation claim against the New Jersey Department of Environmental Protection (NJDEP), after the property had been condemned by the Township of Montville and during a proceeding intended to calculate the compensation the Township owed Petitioner under the New Jersey Eminent Domain Act (EDA), N.J. Stat. Ann. §20:3-1 et seq.

The Court should deny the Petition because the decision presents no issue of federal law. The Township has agreed to pay Petitioner $2,648,500, the fair market value (FMV) for the 42-acre property it condemned in 2002 and for which Petitioner's president paid $300,000 in 1993. (Pa5). This value assumes the property could be used for a 52,000 square foot commercial development that was permitted by NJDEP in 1995 under the Freshwater Wetlands Protection Act (FWPA), N.J. Stat. Ann. §13:9-1 et seq. (Pa10). Petitioner will receive from the Township the FMV to which it is entitled. Furthermore, Petitioner's claim against NJDEP is based upon the provisions of a 1977 consent judgment

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[1] "Pa" refers to the appendix to the petition for certiorari. "P" refers to the petition.

between DEP and its predecessor-in-title. (P4; Pa6-Pa8; Pa18). Interpretation of a state court consent judgment does not raise an issue of federal law. Kokkonen v. Guardian Life Ins. Co. Of Am. 511 U.S. 375, 398 (1994).

Petitioner's inverse condemnation claim against NJDEP also was untimely. The property contains freshwater wetlands which DEP has regulated under the FWPA since 1988, and flood plain which DEP has regulated since 1977 under the Flood Hazard Area Control Act (FHACA), N.J. Stat. Ann. §58:16A-50 et seq. In 1995, Petitioner received FHACA and FWPA permits to construct a 52,000 square foot shopping center on the property, which was never built. (Pa10). Petitioner never alleged that these permit decisions caused a taking of its property without just compensation under Penn Central Trans. Co. v. New York City, 438 U.S. 104, 124 (1978). In addition, Petitioner never appealed the 2002 trial court order (Pa3) awarding the Township title to the property pursuant to N.J. Stat. Ann. §20:3-19, a final judgment appealable as of right pursuant to N.J. Stat. Ann. §20:3-2(j). Petitioner's failure to appeal the 1995 NJDEP permits or the 2002 Township condemnation prevents it from claiming its property was taken without compensation by NJDEP.

The Condemnation Commissioners appointed pursuant to the EDA concluded that the market value of the property was $1,378,000, taking into consideration the fact that a 52,000 square foot shopping center could lawfully be constructed on the property under NJDEP permits (Pa3;P4); since then,

the Township has agreed to increase the figure to $2,648,500. (Pa5). Petitioner appealed the Condemnation Commissioners' award de novo in the Law Division of Superior Court pursuant to New Jersey Court Rule 4:73-6. During that proceeding, Petitioner filed a third-party complaint against NJDEP alleging "inverse condemnation" based on the theory that a 1977 consent judgment between NJDEP and Petitioner's predecessor-in-title exempted the property from any future environmental regulation such as the FWPA (P4; Pa6-Pa8; Pa18). Petitioner demanded judgment against NJDEP for the pre-FWPA value of the property, reduced by the amount of compensation it received from the condemnor-Township. (Pa18-Pa19).

The Appellate Division affirmed the trial court decision granting NJDEP's motion to dismiss the third party complaint. (Pa22). Analyzing the 1977 judgment under New Jersey principles of contract law, the Appellate Division found that the 1977 judgment was a limited-purpose document that settled a 1975 claim for inverse condemnation against NJDEP arising from application of the FHACA. (Pa6;Pa27-Pa28;Pa34). At that time, NJDEP had not yet delineated the flood plain along the Rockaway River as required by the FHACA, and plaintiff-property owners sought to compel NJDEP to condemn the property because they could not determine what portion of it was developable under the FHACA. In the 1977 judgment, the parties stipulated to a "flood water encroachment line" on the property which delineated the area available for development (Pa6) and recorded that delineation with the property deed (Pa7-Pa8;Pa27), thereby eliminating

the need for a FHACA permit to develop the remainder of the property under "the regulations in effect at the time." (Pa6-Pa7;Pa30;Pa33).

The Appellate Division observed that the 1977 consent judgment was silent about the freshwater wetlands on the property which, prior to 1988, were regulated by the U.S. Army Corps of Engineers (ACOE) pursuant to 33 U.S.C.A. §1344. (Pa8;Pa19-Pa20). However, the parties expressly anticipated the possibility of more stringent regulations in the future. (Pa20). Paragraph Eight of the judgment states:

> In the event that plaintiffs' rights with respect to the said property shall be affected by subsequent statutory modification by the Legislature of the State of New Jersey, there is hereby reserved to plaintiffs such rights in condemnation or other rights as may be provided by law and this Judgment shall in n way be constructed to affect any such rights of plaintiffs. (Pa7).

The Appellate Division correctly affirmed the trial court's holding (Pa27;Pa30) that the purpose of the 1977 judgment was to determine the use of the property under the FHACA (Pa27-Pa30), and that nothing in the 1977 judgment gave Petitioner a right to compensation for a loss in value attributable to environmental regulations enacted after the 1977 judgment. (Pa21-Pa22;Pa33-Pa34). The Appellate Division affirmed that such an interpretation would conflict with the purpose of the 1977 judgment. (Pa20).

In addition, the Appellate Division also determined that Petitioner could not sue NJDEP for inverse condemnation after the property had already been condemned by the Township. (Pa14-Pa18). The holding is legally unremarkable. Petitioner's claim alleging "wrongful" application of the 1988 FWPA to the property in violation of the 1977 judgment expired in 1994. N.J. Stat. Ann. §14:2A-1 (imposing six year statute of limitations on takings claims); 287 Corporate Center Associates. v. Township of Bridgewater, 101 F.3d 320 (3rd Cir. 1996). Indeed, mere application of regulations to property seldom constitutes a taking, especially when permits are available. Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 736 (1997).

In addition, NJDEP approved the only development application Petitioner ever filed in 1995. Thus, after 1995, NJDEP took no action to affect Petitioner's property. In 2002, title to Petitioner's property passed to the Township without objection by the Petitioner. For these reasons, the New Jersey Supreme Court appropriately declined to review the Appellate Division decision dismissing Petitioner's inverse condemnation claim against NJDEP, and this Petition should also be denied.

ARGUMENT

CERTIORARI IS NOT WARRANTED BECAUSE THE TOWNSHIP OF MONTVILLE PAID PETITIONER FULL MARKET VALUE FOR THE PROPERTY IT CONDEMNED IN 2002 AND NEW JERSEY COURTS PROPERLY REJECTED PETITIONER'S ATTEMPT TO LATER AUGMENT THAT AWARD THOUGH AN INVERSE CONDEMNATION CLAIM AGAINST NJDEP WHICH WAS LEGALLY UNTENABLE.

Petitioner will receive $2,648,500 from the Township for the condemnation of its property (Pa5) but claims it is entitled to additional compensation from NJDEP. Petitioner seeks compensation "pursuant to the provisions of the [1977] consent judgment" between NJDEP and its predecessor-in-title arising from NJDEP regulation of development in freshwater wetlands under the 1988 FWPA. (P4) However, interpretation of a state court consent judgment does not raise any issue of federal law. Kokkonen v. Guardian Life Ins. Co. Of Am. 511 U.S. 375, 398 (1994). Moreover, the New Jersey courts properly analyzed the 1977 judgment under the New Jersey law of contracts, Nolan v. Lee Ho, 120 N.J. 465, 472 (1990), and correctly concluded that the intent of parties in 1977 was to settle claims under the FHACA by setting a flood water encroachment line demarcating the portion of the property that could be developed under

the FHACA (Pa6), not to exempt the property from all future environmental legislation such as the 1988 FWPA. Noting that the freshwater wetlands on the property were regulated by the ACOE at that time, and the ACOE was not a party to the lawsuit, the trial court and the Appellate Division properly concluded that any claim Petitioner brought based upon regulation of freshwater wetlands was beyond the scope of the 1977 judgment. (Pa8, Pa34). Furthermore, the parties anticipated more restrictive legislation in the future by reserving for the property owner in Paragraph 8 of the judgment "such rights in condemnation or other rights as may be provided by law and this Judgment..." (Pa7).

Petitioner's attempt to convert a state-law breach of contract claim into an inverse condemnation action does not create a federal issue. Petitioner is claiming that NJDEP owes it compensation for the development value of its property as if the FWPA never applied to the property. Petitioner confuses inverse condemnation with a claim for diminution in land value as a result of regulation. Diminution in land value itself does not constitute a taking. Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926); Pheasant Ridge Corp v. Twp. of Warren, 169 N.J. 282 (2001), cert. denied, 535 U.S. 1077 (2002). Furthermore, NJDEP approved a 52,000 square foot shopping center on the property in 1995, which approval was reflected in the FMV paid by the Township. Even if mere application of the 1988 FWPA to the property was actionable, the statute of limitations on such a claim expired in six years, by 1994. N.J. Stat. Ann. §14:2A-1 (imposing six year

statute of limitations on takings claims); 287 Corporate Center Associates. v. Township of Bridgewater, 101 F.3d 320 (3rd Cir. 1996).

The Appellate Division decision dismissing Petitioner's inverse condemnation complaint is also consistent with other legal principles. Inverse condemnation, like direct condemnation, results in a shift of title to the public entity. United States v. Clark, 445 U.S. 253, 257 (1980); Rieder v. State, 221 N.J.Super. 547, 553 (App. Div. 1987). Petitioner's inverse condemnation claim would have been untenable in 2002 since Petitioner was unable to give NJDEP title to the property at that time. (Pa18). Furthermore, by that time, NJDEP had already issued the FWPA and FHACA permits necessary for construction of a 52,000 square foot shopping center, the only project Petitioner ever proposed for the property. Petitioner never timely challenged this application of the FWPA to the property.

In addition, Petitioner had a meaningful opportunity to assert its inverse condemnation claim against NJDEP at the commencement of the Township's condemnation, and failed to do so. The Township filed an Order To Show Cause against Petitioner under N.J. Stat. Ann. §20:3-8, demanding that it show cause why a judgment should not be rendered that the Township "is duly vested with and has duly exercised its authority to acquire the property being condemned." Petitioner never objected, and subsequently the Court held that the Township was authorized to and had duly exercised its power of eminent domain, and the Township acquired fee

simple title to the property "free and discharged of all right, title, interest and liens of all condemnees" including "all the right, title and interest of each condemnee." N.J.Stat.Ann. §20:3-20. Petitioner's appeal of the Condemnation Commissioners' award of compensation did not interfere with the vesting of title in the Township under N.J. Stat. Ann. §20:3-22. Petitioner's failure to object to the order to show cause precluded it from later claiming that DEP should be compelled to purchase the same title due to an alleged regulatory taking. This issue of state law does not present any issue of federal law for review by this Court.

CONCLUSION

For these reasons, the New Jersey Supreme Court appropriately declined to review the Appellate Division decision dismissing Petitioner's inverse condemnation claim against NJDEP, and this Petition should also be denied.

Respectfully submitted,

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*Counsel of Record

Dated: March 31, 2009

120 (3)

No. 08-1016

IN THE

Supreme Court of the United States

MCA ASSOCIATES, L.P.,

Petitioner,

v.

TOWNSHIP OF MONTVILLE, NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, AND THE COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

BRIEF IN OPPOSITION FOR RESPONDENT TOWNSHIP OF MONTVILLE, NEW JERSEY

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PRELIMINARY STATEMENT

Respondent, Township of Montville, is an admittedly minor player in this drama. Petitioner, Montville Center Associates, L.P., seeks a writ of certiorari stemming from a judgment of the New Jersey Superior Court, Appellate Division, affirming certain rulings of the trial court in an eminent domain case. In this regard, the Petitioner complains that the trial and state appellate courts gave short shrift to their allegation of inverse taking against the New Jersey Department of Environmental Protection arising from wetlands regulations. The Petitioner believes that these regulations should not have been considered in the Township's direct condemnation case and that the regulations unlawfully diminished the fair market value of the property taken.

Inasmuch as the Township neither promulgated nor enforced the wetlands regulations complained of, the Township should have no interest in this petition. However, because the Petitioner persists in claiming that either the New Jersey Department of Environmental Protection or the Township of Montville is responsible for a vague diminished value due to the application of wetlands regulations, the Township is compelled to respond and oppose the writ sought. To this end, it is the Township's position that a writ of certiorari should not be granted because the Petitioner fails to advance a ground sufficient for such relief and the Petitioner's Fifth Amendment rights were not violated.

COUNTERSTATEMENT OF THE CASE

On November 17, 2002, the Respondent, Township of Montville [hereinafter referred to as "Township"], filed an order to show cause and verified complaint for the condemnation of real property owned by Petitioner, Montville Center Associates, L.P. [hereinafter referred to as "MCA"]. The public purpose authorizing the Township's exercise of eminent domain adjudicated by the order to show cause was not opposed or appealed by MCA. On December 19, 2002, the Township took title to the real property by the filing of a Declaration of Taking. The case then proceeded to the valuation stage of the condemnation.

During the valuation stage of the proceedings, MCA sought an *in limine* determination of the legal effect of a 1977 Consent Judgment on the valuation of the real property. The 1977 Consent Judgment was entered into between MCA's predecessor in title and Respondent, New Jersey Department of Environmental Protection [hereinafter referred to as "N.J.D.E.P."] and was concerned with the implementation of the Flood Hazard Area Control Act on the subject property. It was MCA's contention that the 1977 Consent Judgment precluded the application of the New Jersey Freshwater Wetlands Act, codified at N.J.STAT.ANN. § 13:9B-1 *et seq.* [hereinafter referred to as "Act" or the "Freshwater Wetlands Act"], enacted later in 1987, from being considered an environmental development constraint for the purposes of valuing the subject property. The trial court determined that the 1977 Consent Judgment did not bar subsequently enacted environmental regulations from being applicable to the property for purposes of valuation.

Thereafter, MCA filed a third-party complaint against the N.J.D.E.P. alleging the Freshwater Wetlands Act constituted an inverse or regulatory taking by diminishing the value of the subject property. Ultimately, the trial court dismissed the third-party complaint and the Township and MCA settled on a value of $2,648,500.00 for the property subject to MCA's right to appeal the trial court's *in limine* ruling and dismissal of the third-party complaint. The New Jersey Superior Court, Appellate Division, affirmed the trial court's rulings and the New Jersey Supreme Court denied certification. Petitioner here does not complain of the trial and appellate courts' construction of the 1977 Consent Judgment, but only complains of the dismissal of the complaint for inverse taking alleging a violation of the Petitioner's Fifth Amendment protections.

ARGUMENT IN OPPOSITION TO THE PETITION

POINT ONE

CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER DID NOT SUFFER ANY DEPRIVATION OF FIFTH AMENDMENT RIGHTS AS PETITIONER WAS JUSTLY COMPENSATED FOR PROPERTY TAKEN FOR A PUBLIC PURPOSE.

The Petitioner asserts that it "should be afforded an opportunity to seek damages for the diminution in value to the subject property . . . [and] present its analysis of the facts under the *Penn Central* formula . . ." (Petitioner's Brief 12). This very statement, however, demonstrates the Petitioner's misconception of inverse taking jurisprudence and misstates the analysis performed by both the trial and appellate courts below.

Taking these points in reverse order, while the Petitioner claims that it was not afforded an opportunity to present argument as to the standards set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), in fact, the Petitioner not only argued the *Penn Central* factors in both the trial and appellate courts, both the trial and appellate courts engaged in the *Penn Central* analysis and were not persuaded. (Petitioner's Appendix 15a-16a). In this regard, while the courts below dismissed the third-party complaint on an issue of standing, the dismissal would have nonetheless resulted under a *Penn Central* analysis. Quite simply, the application of the Freshwater Wetlands Act did not deprive the Petitioner of all economically viable use of its property – a fact made plain by the $2,640,500.00 in compensation paid to the Petitioner despite the application of the freshwater wetlands regulatory constraints. Indeed, the compensation paid to MCA disproves that an inverse taking occurred.

Under the rubric of *Penn Central*, a party making a regulatory takings claim must demonstrate the character of the government action, the economic impact of the regulation on the property owner and the extent to which the regulation interferes with distinct investment-backed expectations of the property owner. *Id.* at 124. Here, the Petitioner's claim fails because the Freshwater Wetlands Act did not objectively thwart the investment-backed expectations of MCA, nor did it have an economic impact of a Constitutional dimension. The property retained significant value.

The Petitioner's belief that it should somehow be compensated for a diminution in value of the land caused by the Freshwater Wetlands Act demonstrates the Petitioner's misconception of the legal standard applicable to a regulatory taking. Simply, regulations that diminish value do not necessarily result in a Constitutional taking. *See Penn Central, supra*, 438 *U.S.* at 124; *Palazzolo v. Rhode Island*, 533 U.S. 606, 627, 121 S. Ct. 2448, 2462, 150 L. Ed. 2d 592 (2001); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018, 112 S. Ct. 2886, 2894, 120 L. Ed. 2d 798 (1992); and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S. Ct. 158, 159, 67 L. Ed. 322 (1922)(stating that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law"). It is been said that inverse condemnation and direct condemnation are "opposite sides of the same legal coin." 2 Nichols, *Eminent Domain* (Sackman ed. 1985) § 6.21(1). However, as this Court recognized in *Lucas, supra*, 505 U.S. at 1015, the inverse condemnation side of the coin has itself two faces – a government's uncompensated physical invasion of property and a government's regulation of property that denies all beneficial or productive use of property. In dealing with the latter, this Court has remained steadfast in its belief that reasonable regulations that do not deprive the owner of all beneficial use rarely rise to the level of a compensable taking. *See Lucas, supra*, 505 U.S. at 1019 and *Palazzolo, supra*, 533 U.S. at 617 (these cases stating the Court's belief that a taking occurs when regulations deny *all* economically beneficial or productive uses of land).

In this case, MCA was paid fair market value of the property directly taken by the Township, based upon the property's highest and best use considering the physical and legal regulatory constraints affecting the property. While the application of the Freshwater Wetlands Act undoubtedly affected the property's value, the property nonetheless retained significant development potential, and consequently value, as demonstrated by the compensation paid, notwithstanding the application of the Act. Accordingly, the Petitioner did not suffer a regulatory taking offensive of the Fifth Amendment and the petition should be denied.[1]

Additionally, the Petitioner urges that either the N.J.D.E.P. or the Township is responsible for the diminution of value caused by the Freshwater Wetlands Act. On this account, however, the Petitioner proffers no law assigning such responsibility to the Township by way of its direct taking. The state courts below interpreted the 1977 Consent Judgment so as to require the value of the subject property to reflect the application of the Freshwater Wetlands Act. Insofar as the Township, as the direct condemnor, was required pursuant to N.J.STAT.ANN. § 20:3-19 to provide just compensation to MCA based upon the value of the

1. The folly of Petitioner's underlying thesis is splayed open when a general rule is considered. If the Petitioner were correct in its argument, then any time vacant property is directly taken by a government, the property owner would be permitted to pursue a value that would account for diminutions created by zoning, environmental, and similar regulations that limit a property's development potential. Such a result is antithetical to the well established law of direct and regulatory takings.

highest and best use of land acquired, and such compensation was paid by the Township, the Township is not legally obligated to pay any additional compensation for a perceived diminution of value based upon regulations the Township did not impose or promulgate.

POINT TWO

A WRIT OF CERTIORARI SHOULD NOT ISSUE BECAUSE PETITIONER FAILS TO ADVANCE A SUFFICIENT GROUND OR COMPELLING REASON FOR SUCH RELIEF.

As provided by the Rules of this Court, a writ of certiorari should only be granted for compelling reasons. Here, Petitioner implicates Sup.Ct.R. 10(b) as a basis for consideration, which provides "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." In this cause, the determination of the Supreme Court of New Jersey, by and through its denial of certification of the Appellate Division's judgment, neither fundamentally conflicts with an on point decision of another state court of last resort, nor does it conflict with a decision of a United States court of appeals. More importantly, however, the decision rendered below does not implicate an important federal question that offers a compelling reason for issuing the requested writ.

The Petitioner urges that the dismissal of a third-party inverse takings claim for lack of standing subsequent to a direct taking violates its Fifth

Amendment protections. On this account, Petitioner cites four decisions from sister states in an effort to support a conflict on the standing issue. However, Petitioner's reliance on the cited authorities is misplaced, as these particular cases are legally and factually distinguishable from the instant matter, and several do not arise from the sister states' courts of last resort.

Petitioner cites *Albahary v. City of Bristol*, 276 Conn. 246, 886 A.2d 802 (2005); *Red Mountain v. Fallbrook Public Utility District*, 143 Cal.App.4th 333, 48 Cal.Rptr.3d 875 (App. 2006); *Shealy v. Unified Government of Athens-Clarke County*, 244 Ga.App. 853, 537 S.E.2d 105 (2000); and *City of Lake Station v. Rogers*, 500 N.E.2d 235 (Ind. 1986) for the proposition that a property owner retains standing to sue for inverse condemnation after a direct taking has occurred. Of these four cases, only one issued from the court of last resort.

More importantly, however, none of the cited cases address a claim of inverse taking by way of regulation. Rather, the cited cases all concern standing for an inverse or partial takings claim by way of a physical invasion into lands or title interests. As indicated in point one *supra*, there is a significant difference between an inverse taking by regulation and one by physical invasion. Taken in turn, *Albahary v. City of Bristol*, 276 Conn. 246 (2005) is a case concerning pre-taking damages to property caused by ground water contamination – a physical invasion. There, the Supreme Court of Connecticut held that a property owner does have standing to claim inverse taking damages

secondary to contamination in the context of a direct taking by the government to account for the diminution in value caused by such contamination. It is worthy to note that in New Jersey, no such inverse takings claim would be required to assure the just compensation for property directly condemned that is contaminated. Such properties are valued as if fully remediated and without contamination, leaving the condemning authority to later seek off-setting remediation costs from prior responsible parties. *Housing Authority of the City of New Brunswick v. Suydam Investors, LLC*, 177 N.J. 2 (2003), 826 A.2d 673 (2003). In MCA's case, there was no prior governmental physical invasion, contamination or any pre-taking damage to the property. There was simply zoning and environmental regulations that limited the scope of potential development.

Likewise, in *Red Mountain v. Fallbrook Public Utility District*, 143 Cal.App.4th 333 (2006), the California appellate court considered a standing issue quite different from the case at bar. There, the government's denial of an access easement precluded reasonable development of the condemnee's land, thus creating an inverse taking. The government there, however, also instituted a direct condemnation of a smaller portion of the land to foreclose any alleged easement and take fee title to same. In this regard, the hostile title actions of the government prior to the direct taking substantially reduced the value of the land and value of the fee taken by condemnation. In fact, there the court clearly stated that the direct and inverse takings claims "did not involve the exact same property, legal issues or damages." *Id.* at 357.

Like *Albahary*, the case of *Shealy v. Unified Government of Athens-Clarke County*, 244 Ga.App. 853 (2000) is one of physical invasion by contaminants. There, the appellate court of Georgia held that because of the distinct nature of the loss and diminution of value secondary to contamination was distinct from the direct condemnation, such action was not moot and the diminution of value from the contamination was actionable. Again, in this pre-taking contamination context, the law of New Jersey would not require two distinct actions equitably to fix value.

Finally, *City of Lake Station v. Rogers*, 500 N.E.2d 235 (Ind. 1986) presents a case where property taken by a direct condemnation was previously utilized by the condemning authority as a garbage dump and for the extraction of sand for which the property owner was not compensated. There, the appellate court of Indiana held that the inverse taking by depriving the prior owner of mineral profits was actionable. Importantly, however, under the law of Indiana, the compensation related to the direct taking is for the condition of the property at the time of taking. *Id.* at 239. Therefore, like in *Albahary* and *Shealy*, the direct taking did not account for value lost because of prior physical invasion of the property by the condemning authority, thus requiring a separate action for the equitable recovery of value deprived by the government's actions.

The case at bar involves an allegation that wetlands regulations, not a physical invasion, diminished the value of the property. Clearly, the standing issues resolved by the cited cases are distinguishable from this matter, as those cases address a condemning authority's physical

invasion of property that substantially reduced the value of property prior to direct takings. Inasmuch as the cited cases are factually and legally distinguishable from the decision rendered in the instant case, it is respectfully submitted that the Petitioner has failed to demonstrate a conflict of a federal question sufficient to compel the issuance of the requested writ.

CONCLUSION

For the reasons stated above, Respondent, Township of Montville, respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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